82-590

Office - Supreme Court, U.S.
FILED
SEP 27 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1982

MORRIS I. KURTZ,

Petitioner

v.

UNITED STATES OF AMERICA
on behalf of its agency
THE SMALL BUSINESS ADMINISTRATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:
SIDKOFF, PINCUS, GREENBERG & GREEN, P.C.
530 Walnut Street, Twelfth Floor
Philadelphia, PA 19106
(215) 574-0600

On the Brief:
BERNARD SIMONS of
GENDEL, RASKOFF, SHAPIRO & QUITTNER
Century Park Plaza, Sixth Floor
1801 Century Park East
Los Angeles, CA 90067
(213) 277-5400

WILBUR GREENBERG
ALBERT J. OLIZI, Jr.
Attorneys for Petitioner,
Morris I. Kurtz

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Did the decisions of the Courts below which permitted the SBA, an assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment, effect a result which violated rulings of this Honorable Court?

2. Did the decision of the Courts below which ruled that Kurtz, a guarantor, was a "debtor" for certain purposes under the California Uniform Commercial Code and not for others create a conflict among the circuits on this question of law?

3. Did the Courts below err in making factual findings without the benefit of having any evidence concerning said disputed crucial issues of fact?

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdictional Statement	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	21
Certificate of Service	22

TABLE OF CITATIONS

Cases:	Page
Barber v. LeRoy, 40 Cal App 3d. 366, 115 Cal. Rptr. 272 (1974)	17
Hollerbach v. United States, 283 U.S. 165, 58 L.Ed. 898 (1915)	11, 12
Lynch v. United States, 292 U.S. 571, 78 L.Ed. 1434 (1933)	11, 12
Reading Steel Casting Co. v. United States 28 U.S. 186, 69 L.Ed. 907 (1924)	11, 12
United States v. Conrad Pub. Co., 589 F.2d 949 (8th Cir., 1978)	16
United States v. Kimbell Foods, Inc., 440 U.S. 715, 59 L.Ed. 2d 711 (1979)	9, 11, 12, 13
United States v. O'Brien, No. 77-C-559 (E.D. Wis., 2/2/79)	16
United States v. Standard Rice Co., Inc. 336 U.S. 106, 89 L.Ed. 104 (1944)	11, 12

TABLE OF CITATIONS—*(Continued)*

Cases:	Page
United States v. Terrey, 524 F.2d 685 (5th Cir., 1977)	16
United States v. Willis, 593 F.2d 247 (6th Cir., 1979)	16
United States v. Yazell, 382 U.S. 341, 15 L.Ed. 2d 404 (1966)	9, 10, 13
U.S.A. v. Chatlin's Department Store, 506 F. Supp. 108 (E.D. Pa., 1980)	15, 16

Statutes and Rules:	Page
California Code of Civil Procedure §337(1)	8
California Uniform Commercial Code	
§9-105	14, 18
§9-501(3)	15
§9-504(3)	13, 14, 15, 18
Federal Rule of Civil Procedure 56 (c)	12, 18

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1982

MORRIS I. KURTZ,

Petitioner

v.

UNITED STATES OF AMERICA
on behalf of its agency
THE SMALL BUSINESS ADMINISTRATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Morris I Kurtz, respectfully prays that a Writ of Certiorari be issued to review a Judgment Order of the United States Court of Appeals for the Third Circuit entered in this matter on July 7, 1982.

OPINION BELOW

The Judgment Order of the Court of Appeals for the Third Circuit and the Opinion and Order of the United States District Court for the Eastern District of Pennsyl-

vania appear in the Appendix hereto. The Opinion and Order of the District Court is reported at 525 F.Supp 734 (E.D. Pa., 1981).

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the decisions of the Courts below which permitted the SBA, an assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment, effect a result which violated rulings of this Honorable Court?

2. Did the decision of the Courts below which ruled that Kurtz, a guarantor, was a "debtor" for certain purposes under the California Uniform Commercial Code and not for others create a conflict among the circuits on this question of law?

3. Did the Courts below err in making factual findings without the benefit of having any evidence concerning said disputed crucial issues of fact?

STATUTORY PROVISIONS INVOLVED

Time for Commencing Actions Brought by the United States 28 U.S.C. §2415

California Code of Civil Procedure §337

California Uniform Commercial Code

§9-105

§9-501

§9-504

Full texts of the provisions cited above are set forth in the appendix hereto.

STATEMENT OF THE CASE

Procedural Background

This action was commenced by the United States on behalf of its agency, the Small Business Administration, to recover a deficiency judgment against Morris I. Kurtz, a guarantor of a loan made to Arnold's Cleaners, Inc. in April of 1969.

The government filed a Motion for Summary Judgment which was denied by Order of the District Court entered on May 17, 1979. Subsequently, on April 23, 1980 Defendant filed a Motion for Summary Judgment and, at the same time, the government re-filed its Motion for Summary Judgment. In its Opinion and Order entered October 30, 1981, the District Court granted the government's Motion for Summary Judgment and denied Defendant's Motion. Judgment was entered in favor of the government on November 3, 1981.

The Order of the District Court and the Judgment entered thereon were appealed by Kurtz to the United States Court of Appeals for the Third Circuit on November 13, 1981. By Judgment Order entered on July 7, 1982, the Judgment of the District Court was affirmed without an opinion but "essentially for the reasons set forth in the Opinion of the District Court which is reported at 525 F.Supp 734 (E.D. Pa., 1981)."

For the benefit of this Honorable Court, since the Court of Appeals adopted the Opinion of the District Court, references herein when made to the District Court's Opinion are to be considered as being references to the decision of the Court of Appeals decision as well.

Factual Background

On April 11, 1969, Arnold's Cleaners, Inc. (hereinafter refered to as "ARNOLD'S") , entered into a Loan Agreement with Guardian Mutual Life Insurance Company of America (hereinafter referred to as "GUARD-

IAN") secured by a promissory note in the amount of Four Hundred Thousand ($400,000.00) Dollars with interest at 8% per annum (known hereinafter sometimes as "ORIGINAL LOAN"). At all times material hereto, Arnold's was a California Corporation engaged in the dry cleaning business in Los Angeles. Morris I. Kurtz, the sole shareholder of Arnold's, guaranteed the original loan. As part of the loan package, the Small Business Administration (hereinafter referred to as "SBA" or "GOVERNMENT") guaranteed, in addition, 90% of the loan.

By reason of its anticipated position as guarantor of 90% of the amount of the loan to Arnold's, the SBA, through the actions of its local counsel, had become closely involved in every aspect of the transaction. SBA employees and attorneys participated in all negotiations, reviewed every document and approved every aspect of the transaction. A cursory review of the loan documents (which are included in the Appendix) reveals that although some of the documents were standard SBA forms, most were drafted and tailored specifically to meet the needs of the situation and the demands of the SBA, acting through its local counsel.

Arnold's was unable to make all required payments to Guardian between September, 1969 and January 1970. On December 14, 1970, due to Arnold's failure to meet its obligations as they became due, Guardian made demand on SBA for payment of the guaranteed portion of the loan. SBA honored the demand, paid the *total* amount due to Guardian on December 17, 1970, and Guardian assigned its rights to SBA.

Shortly thereafter, Arnold's filed a Petition For An Arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§702-799 (repealed October 1, 1979) in the United States District Court for the Central District of California. The SBA, Arnold's only major secured creditor, filed a proof of claim in the Bankruptcy proceedings on May 7, 1971. On June 11, 1971, a plan of Arrangement was submitted to the Court and to Arnolds' credi-

tors. The plan proposed that, 1) Arnold's be divided into two separate business operations, one for dry cleaning and one for Uniform Rentals;* 2) that the SBA release its security interest in the assets of the Uniform Rental business and in any after-acquired property; 3) that the reorganized debtor (a new legal entity) pay off a portion of the debt owed to SBA pursuant to a specified schedule; and, 4) that Kurtz surrender his shares in Arnold's and thereby terminate his interest in and control of the business.

The proposed plan was adopted by all of Arnolds' creditors, despite the written objections of Kurtz. The plan fixed the sum payable to SBA by the reorganized debtor at $379,126.32 with interest at 6% per annum. It was agreed further by and between SBA and the reorganized debtor that the sum due the SBA would be paid in monthly installments equal to one-half (½) the net profits earned by Arnold's; or according to a schedule, whichever amount was greater. Kurtz was compelled also to surrender his stock in Arnold's and to terminate any interest which the shares may have given him in the reorganized debtor.

The reorganized debtor thereafter commenced operations and made several payments (between December, 1971 and April, 1972) totalling $1,750.00. At that time, the reorganized debtor ceased operations and made no further payments to SBA. Arnold's remained closed and subject to the sole and exclusive control of the SBA for nearly seven months, after which the assets of the reorganized debtor were ultimately and formally liquidated in November, 1972 by the SBA at Public Auction; without notice to Kurtz. From the liquidation, the sum of $7,867.88 was realized and credited to Arnold's

---

*The primary reason for Arnold's having entered into the loan transaction was to permit it to engage in the uniform rental business. Arnold's required the money to purchase the necessary inventory and equipment.

account with the SBA. Thereafter, nothing happened until May 8, 1975 when SBA requested payment from Kurtz pursuant to his guarantee of April, 1969. Subsequently, on February 3, 1976, the government filed the instant action to enforce the guaranty.

REASONS FOR GRANTING THE WRIT

I. The decisions of the Courts below which permitted the SBA, as assignee of the rights of a private entity, to change unilaterally the terms of an agreement after its assignment were in direct violation of the rulings of this Honorable Court

This case arose out of the default of Arnold's to honor its obligation on a simple loan agreement between two private entities. The obligations of Arnold's were secured by an SBA guaranty and the personal guaranty of Kurtz. Every aspect of the transaction; including all negotiations, the preparation and execution of documents took place within the legal boundaries of the State of California. All parties to the transaction, including the SBA, were represented in all phases of the transaction by local counsel, familiar with the laws of the State of California. The documents ultimately executed were the result of careful and detailed negotiation and examination by these local counsel. The terms of the agreements which resulted from this process provided that they would be governed by the laws of the State of California.

One of the specially drafted documents involved in this transaction was entitled "Supplement to Loan Agreement and Note." (A.66). This document contained a careful and detailed recitation of the specific conditions, covenants and considerations upon which the transaction was based. One specific clause of that agreement, contained in Par. 8.4 thereof, contained the following language:

> "This Agreement is being delivered and is intended to be performed in the State of California and shall be construed and enforced in accordance with the laws threreof."

The language of the agreement established clearly and beyond dispute that the law governing all aspects of

the transaction was the law of California. The SBA, which was the essential party to the transaction, did not object to the terms, and, in fact, approved the language of the agreement. Obviously, the SBA was aware during the negotiations of the possibility that at some time in the future, in the event of default, it would step into the shoes of the guaranteed party and thus be bound by the very same terms of the agreement.

Subsequent to Arnold's default, the SBA, on December 17, 1971, honored its guaranty to Guardian and obtained from Guardian an assignment of Guardian's rights against Kurtz. But, the government did not proceed against Kurtz. Rather, the government chose alternative means of recovery of its claim in the reorganization of Arnold's. From December 17, 1971 until February 3, 1976, when this suit was filed, the government took no legal action against Kurtz. Thus, by the time the government sought to enforce the Kurtz obligation by lawful means, the four year California Statute of Limitations had run and the claim had become time-barred.* Nevertheless, the government was not deterred. It discovered that a more suitable federal statute of limitations existed which, if applied, would save the government's action from dismissal.

Unfortunately, the District Court and the Court of Appeals applied the federal limitations provision to the case at bar. The effect of the decisions below was to permit the government unilaterally to change terms which were material to the agreement simply by an assignment of that agreement to the government, with complete disregard for the rights of the other parties involved in the transaction. The federal statute of limitations gave the government six years, rather than four, within which to commence its action.

---

* Cal. Civ. Proc. Code §337(1) provides for commencement "within four (4) years:

1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . (A-94).

The approach taken by the government in this case is not an unusual one. This Honorable Court has dealt with similar cases on at least two occasions; in *United States v. Yazell*, 382 U.S. 341, 15 L.Ed. 2d 404 (1966) and in *United States v. Kimbell Foods, Inc.* 440 U.S. 715, 59 L.Ed 2d 711 (1979). In each case, although the government has sought the application of more favorable federal law in disregard of the contents of its agreement, this Court has ruled that the law of the state upon which the parties had agreed originally shall apply. Yet, the government persists in treating contracts as if they were chamelions which change to suit its needs in any situation.

In *United States v. Yazell, supra,* the government attempted to enforce a deficiency judgment against the separate property of a spouse which was protected from lien by the coverture law of Texas. The SBA had acted in much the same manner, in the *Yazell* case as it did in the instant case; i.e., through local counsel, which designated that the laws of Texas should goven the construction and enforcement of the agreement.

This Honorable court, in an opinion by Justice Fortas, noted four specific factors which mandated the application of Texas law to the case before it. The court noted:

> 1) The loan was custom tailored to the situation with specific reference to Texas law;
> 2) The SBA was aware of and chargeable with knowledge that the transaction would be governed by local (Texas) law;
> 3) The parties entered into the agreement without any thought that the defenses available under Texas law would not be available to them; and
> 4) Under the circumstances, the Government attempted to obtain an unfair advantage for which it had not bargained.
> id. 382 U.S. 345-346; 15 L.Ed. 2d 407.

The factors upon which this court relied in *Yazell*, supra, apply with equal force in this case, and dictate the application of California law. Nevertheless, the District Court and the Court of Appeals completely disregarded these factors and sought to find support for the government's position in a so-called "umbrella" clause contained in Par. 7 of the Supplement to the Loan Agreement and Note which stated:

> "[i]t is not intended that any of the terms or conditions recited herein be inconsistent with the provisions of the Small Business Act or any rules or regulations promulgated thereunder or inconsistent with any other law applicable to this transaction."

Under the district court's interpretation of the "umbrella" clause, the court in essence took away from the parties to the agreement the rights with regard to which they had specifically agreed, and gave to the government an unfair advantage which was not provided to the assignor, the party from whom the government's right of collection derived.

Thus, in light of the circumstances presented, the District Court and the Court of Appeals whose decisions did not apply the law mandated by this Honorable Court in *United States v. Yazell*, supra, effected a substantial injustice to Kurtz, and subjected a contract, which was clear in its terms, to a metamorphosis which permitted it to be changed at the whim of the party attempting to enforce it. Certainly, the government would not dispute the fact that if Guardian had, instead of making demand upon SBA, sought to enforce the contract against Kurtz, or if the government had subsequently reassigned the contract to a private entity, California Law would apply. However, the government does contend that because it paid the amount due on the loan and "bought" the rights which Guardian possessed and was attempting to enforce these rights, that those rights in some way became different in nature, and subject to a set of rules and stat-

utes different from those provided by the agreement. This was certainly never the intent of the parties and certainly this was never contemplated by this Honorable Court when it stated in *Lynch v. United States*, 292 U.S. 571, 78 L.Ed 1434 (1933):

> "When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Thus, the government, just as any private entity may not change the terms of an agreement after it has been assigned. See also, *Hollerbach v. United States*, 283 U.S. 165, 58 L.Ed 898 (1915); *United States v. Standard Rice Co., Inc.*, 363 U.S. 106, 89 L.Ed 104 (1944); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 69 L.Ed 907 (1924).

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 59 L.Ed 2d 711 (1979), this Honorable Court was again faced with a situation similar to the instant case. In *Kimbell*, the issue was, should the lien priority laws existing in the state of Texas be applied to bar a claim by the government arising from an SBA transaction. In that case, the government sought the Court's protection from the adverse affect which different laws of various states could possibly have upon an SBA obligation. Thus, as here, the Government advocated the adoption of a national policy on priority of liens which would elevate Government liens derived from SBA obligations to positions superior to those perfected in accordance with state laws. This Honorable Court, in *Kimbell* declined to fashion a uniform or national rule as requested by the government and expressed great concern over any action by the government which would be disruptive of relations premised upon state commercial statutes. As it did in *Yazell*, this Honorable Court made certain observations which are applicable to this case. First, it was noted that the SBA operations concerning loan transac-

tions were adapted in great detail and with specific reference to State law. id., 440 U.S. 729-730; 59 L.Ed 2d 725. Second, the SBA's employees were instructed to comply with state law and did in fact, make use of local offices and employees familiar with the law of the locality involved id. 440 U.S. 729-730, 732; 59 L.Ed 2d 725-726. Third, this Honorable Court placed significant emphasis upon the need to avoid the disruption of the laws upon which private creditors rely in their affairs, id., 440 U.S. 729; 59 L.Ed 2d 725. Finally, the Court noted the need for stability and reliability in financial transactions. id. 440 U.S. 739, 740; 59 L.Ed 730-731.

The decisions of the Courts below in this case are not in accord with this Court's decision in *Kimbell*. Moreover, the effect of the decisions below operate to undercut the policy of stability and reliability which this Court attempted to foster in *Kimbell*. Certainly there can be no sense of stability or reliability where Government guaranteed loans are involved, when the government is permitted unilaterally to change the terms of agreements entered into by private individuals under SBA supervision and with its approval. Such a standard advocated by the government and applied by the District Court and Court of Appeals should not be condoned.

The government, when it comes into the area of commercial finance, enters the marketplace in the same way as any commercial lender. Its rights and duties with regard to financial transactions in which it may engage are governed by the same laws of contracts which govern private entities. *Lynch v. United States*, 292 U.S. 571, 78 L.Ed 1434 (1933); *Hollerback v. United States*, 233 U.S. 165, 58 L.Ed 898 (1913); *United States v. Standard Rice Co., Inc.*, 323 U.S. 106, 89 L.Ed 104 (1944); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 69 L.Ed 907 (1924). The government, simply by virtue of its status as the government, or by the size of the transactions undertaken and the risks involved is entitled to no greater protection than that accorded ordi-

nary lenders. *United States v. Kimbell Foods, Inc.*, supra, at 440 U.S. 337. *United States v. Yazell*, supra, at 382 U.S. 347 Fn. 13.

Therefore, in light of the circumstances presented in this case, it is respectfully submitted that the Court of Appeals and the District Court have rendered determinations in this case in clear conflict with the pertinent decisions of this court, and thus, review of this case upon Certiorari is warranted.

II. The decisions of the Courts below that Kurtz as a Guarantor was a "debtor" under the California Uniform Commercial Code for certain purposes and not for other purposes was arbitrary and in direct conflict with holdings of other Circuits which have decided this question and with the policy of California Courts.

In the District Court, Kurtz raised a defense based upon section 9-504(3) of the California Uniform Commercial Code.* Kurtz's defense in this regard challenged the "commercial reasonableness" of the SBA's liquidation of Arnold's assets in November of 1972. Kurtz contended also that (1) he was not provided with notice of the sale of the assets as required by the code; and, (2) the manner in which the sale was conducted did not conform with the standards set forth in the code.

At first, no one disputed the applicability of California law to this case and to this issue. Thus, during discovery, the government stated in its answers to Interrogatory 21 (A-44):

> "All collateral pledged by Arnold's Cleaners, Inc. was exposed for public auction sale pursuant to the *Uniform Commercial Code, as adopted in the State of California* . . ." (Emphasis Supplied)

---

*Section 9-504(3) is reproduced in its entirety at A-101.

However, when the government was challenged for its failure to comply with the terms of the California Uniform Commercial Code, for its failure to give Kurtz notice and for its failure to conduct the sale properly, the government, as it did with regard to the statute of limitations, sought a more favorable federal statute behind which it could shield itself and legitimize its tactics. This time though, there was no federal statute which the government could apply, and so the government sought to do the next best thing, by formulating a statute that would apply. Thus, the government advocated that the District Court formulate a standard which would specifically address the situation in a manner favorable to its position through application of a generalized commercial law premised upon the Uniform Commercial Code in general, without specific reference to any state.

The District Court denied in principal, the theory advocated by the government but through a convoluted analysis of the California Uniform Commercial Code protected the Government's interests and circumvented the direct application of the California Code to this case.

The District Court ruled that the California Code was applicable in determining the propriety of the SBA's liquidation of collateral. The Court, thus, found that Kurtz, as a "guarantor" of the obligation owed by Arnold's, was a "debtor" as defined by the Code*, and that Kurtz had standing to raise the defense of "commercial unreasonableness" contained in §9-504(3). However, the District Court then ruled that Kurtz was not considered a "debtor" with regard to the provisions of the Code prohibiting waiver of the protections of §9-504(3). Thus, the guaranty agreement (A-75) executed by Kurtz was construed by the Court as a waiver of the rights provided by that part of the code. It is respectfully submitted

---

* "Sec. 9-105 of the Code defines a debtor as follows:

> . . . [T]he person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral."

that such a finding was neither premised upon the facts of this case, nor upon the applicable law and was clearly arbitrary.

Section 9-501(3) of the California Uniform Commercial Code specifically prohibits the contractual waiver by a debtor of the express protections afforded debtors by §9-504(3)*. Hence a simple analysis of the terms of the Code would render a finding that Kurtz, being a "debtor" as defined in the Code, is entitled to the protection afforded "debtors" by virtue of §9-501(3)(b). Ergo, Kurtz could not waive the benefits of "commercial reasonableness" provided by §9-504(3). The District Court could, and should, have made the determination from specific reference to the Code provisions. However, the Court did not, and made its finding based upon a blind choice among holdings of other courts which were split in favor of and against Kurtz's position. In fact, the decision of the District Court was in direct conflict with the decision rendered by Judge Giles of the same Court one year earlier in *U.S.A. v. Chatlin's Department Store*, 506 F.Supp. 108 (E.D. Pa., 1980) In *Chatlin's*, the government claimed just as it did in this case, that by executing the guaranty agreement, the guarantors waived the defenses provided by §9-504(3) of the Code. The Court found to the contrary based upon holdings of Circuits which had ruled upon substantially similar cases. Thus, the Court stated:

---

* §9-501(3) of the California Uniform Commercial Code states:

> (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to redemption of collateral (Section 9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
>
> * * *
>
> (b) Subdivision (3) of Section 9504 which deals with disposition of collateral; (A-99)

"The district court in O'Brien* held that by signing the unconditional guaranty agreement, the Defendants waived absolutely all their rights to preservation of collateral. The Court, however, did not treat the policy considerations above, and did not acknowledge the Circuit Court decisions in Willis, Conrad and Terrey**. Those decisions did not construe the guaranty agreement as an absolute waiver of any and all defenses. Rather, each stressed that the commercial understanding of the term "unconditional guaranty" is that it is a limited term. That is, in the trade, the term denotes only that no duty is imposed on the creditor to attempt to collect from the primary obligor prior to attempting to collect from the individual guarantor." id. 506 F.Supp 111.

The Court in *Chatlin's*, recognizing the manifest unfairness presented by an adoption of the government's position on waiver went further to state, quoting from *United States v. Willis*, 593 F.2d 247, 255 (6th Cir. 1979)

"[A]s a matter of federal law, even the broad language [of the unconditional guaranty agreement] will not be deemed to relieve the SBA of any and all responsibility to debtors in disposing of collateral securing its loans. This Court cannot and will not sanction the kind of economic waste and financial hardship the government's interpretation of the language has the potential of bringing about . . . the discretion inferred [by the agreement] was never intended to be boundless. . ."

The decisions of the Courts below in this case being directly contrary to the decision of the Court in *Chatlin's*, and the cases cited therein, create a conflict

---

* *United States v. O'Brien*, No. 77-C-559 (E.D. Wis. 2/2/79)

** *United States v. Willis*, 593 F. 2d 247 (6th Cir., 1979), *United States v. Conrad Pub. Co.* 589 F.2d 949 (8th Cir., 1978); *United States v. Terrey*, 524 F.2d 685 (5th Cir., 1977).

with the Fifth, Sixth, and Eighth Circuits as to the proper resolution of the issue presented.

It is respectfully submitted that the District Court should have applied the statutory language of the Code which was clear and unambiguous and which, if applied, would have mandated a finding that Kurtz, by law, could not waive his rights to protection afforded by §9-504(3). Moreover, since the law of the state of California was deemed applicable to the resolution of this issue, the Courts below should have applied the law as a California State Court would have. There was sufficient California case law to support a finding that Kurtz could not waive these rights. Although no California Court (in any reported decision) ever squarely addressed this issue, the decision of the California State Appellate Court in *Barber v. LeRoy*, 40 Cal App 3d 366, 115 Cal Rptr. 272 (1974) was pertinent. In that case, the Court refused to enforce a provision in a security agreement waiving a prohibition in §9-504(3) against purchase of collateral by the secured party at a private sale. The Court reasoned that such a waiver prior to default violated §9-501(3) and was against public policy. The Court stated, at 40 Cal. App. 3d 344, 115 Cal Rptr. 277-278:

> "We further hold that the language of the security agreement which constitutes a waiver of the provisions of §9-504(3) constitutes a violation of §9-501(3), is therefore contrary to public policy and consequently it is void."

In its analysis of the Uniform Commercial Code, the Court in *Barber v. LeRoy*, supra, stated quite succinctly:

> "Section 9-504(3) requires not only notice to the debtor, but that the sale of collateral be conducted in a 'commercially reasonable manner' and those are two of the duties imposed upon the secured party which §9-501(3) provides may not be waived in advance."
>
> id. 40 Cal. App. 3d 342-343; 115 Cal. Rptr. 277.

This analysis should have been applied in the instant case. When the SBA was not repaid in full by Arnold's, for all intents and purposes, and by virtue of the provisions of §9-105 of the Code, Kurtz became the debtor. He was the party who became obligated to satisfy the obligations of Arnold's. The duties imposed upon the SBA with regard to notice and "commercial reasonableness" could not vary depending upon the identity of the debtor, and thus those duties were owed to Kurtz. The government was obliged to comply with the clear mandate of §9-504(3); to notify Kurtz of the sale and to conduct the sale in a "commercially reasonable" manner. Kurtz could not, prior to default by Arnold's, lawfully waive those duties which were imposed upon the SBA by the Code. Therefore, the Courts' determination in this case that Kurtz waived the protections of §9-504(3), was erroneous and in clear contravention of public policy adopted by the State of California and of the specific terms of the Uniform Commercial Code which governed in this case.

The decision rendered by the District Court and by the Court of Appeals in this case are not only erroneous but have created a conflict among various circuits with regard to the interpretation of the Uniform Commercial Code, which can be corrected only by this Honorable Court's review.

III. The Opinion of the District Court which was affirmed on appeal included certain findings of fact which were made on crucial and disputed issues without any evidence having been presented and thus the granting of Summary Judgment in favor of the Government violated Federal Rule of Civil Procedure 56.

In granting the government's motion for Summary Judgment, the District Court ruled without the benefit of any evidence, but simply upon the arguments of counsel. However, there were certain findings made by

the court which required a hearing. For example, Kurtz asserted as one of several alternative arguments, that Arnold's had not made all of the required payments to Guardian between September 1969, and January 1970 and that his liability by the terms of the guaranty agreement was triggered by Arnold's non-payment. Therefore, once Arnold's defaulted (i.e. failed to pay timely), Kurtz became liable automatically and without regard to demand.* Therefore, Arnold's having defaulted between September 1969 and January 1970, Kurtz's liability arose at that time. Thus, regardless of which limitations provision (state or federal) the Court chose to apply, the Government's claim would be time barred since its suit was not started until more than six (6) years later, on February 3, 1976.

The District Court did not and could not determine from the record before it and without a trial, the date upon which Kurtz's liability and the Government's claim came into being. Thus, the Court skirted the issue and found (without any evidence) that the cause of action accrued before the government made demand for payment on May 5, 1975, but not before February 3, 1970. (A-8)

How did the Court fix the date, February 3, 1970? Upon what evidence did the Court rely to make such a finding? Obviously, the date was chosen for convenience, to obviate a hearing on the issue. There was no evidence to support such a finding or to rebut Kurtz's contention which was supported by his affidavit (A-86) that the date of default occurred earlier than February 1970.

Thus, Summary Judgment should not have been granted in favor of the government. The issue of when the claim arose constituted a question of material fact

---

*The guaranty agreement expressly provided that the secured party had no obligation upon default by the debtor to exhaust its remedies against any other parties before seeking repayment from the guarantor. (A-77)

which was still an issue to be resolved and which was never free from doubt. Fed.R.Civ.Pro. 56(c). Moreover, the only evidence before the Court on the issue, namely, Kurtz's affidavit (A-85) having been unrebutted by the government, would have necessitated a finding by the Court of a default having occurred prior to February 1970. Such a finding would ultimately have resulted in the complete bar of the Government's action, or at the very least, a bar to Summary Judgment for the Government. However, the District Court's arbitrary finding completely disregarded this evidence.

One further example of the District Court's imprudent granting of Summary Judgment in this case should be noted. The District Court, although finding that Kurtz had waived the protections of §9-504(3) of the Code stated in its opinion:

> "The Guarantor does have rights 'by reason of any deterioration, waste, or loss by fire, theft or otherwise of any of the collateral . . . caused by the wilful act or wilful failure to act of bank'. But there are no allegations of such wilful behavior here." (A-24)

To the contrary, Kurtz alleged in his answer to the Complaint (A-35, A-36):

> **"NINTH AFFIRMATIVE DEFENSE**
> Plaintiff's cause of action is barred because Plaintiff and its assignor acquiesced in the dissipation of the assets which were the security for the loan"
>
> **"FIFTEENTH AFFIRMATIVE DEFENSE**
> Plaintiff and its assignor conspired with others and did, with others, engage in acts which defrauded Defendant"

In addition to these affirmative defenses, Kurtz raised a counterclaim against the government alleging wilful misconduct on the part of the government in connection with the protection and preservation of the collateral securing the loan. (A-37, A-38). Apparently, these

allegations, were simply ignored. Kurtz had complied with the very terms set forth in the Court's opinion. Kurtz had these defenses available and he did in fact raise them. Thus, there should have been a hearing to determine their sufficiency. They should not have been ignored as they were by the District Court and by the Court of Appeals. Kurtz respectfully requests this Court to review these defenses which have thus far fallen upon deaf ears.

IV. CONCLUSION

A Writ of Certiorari should issue to review the Judgment Order of the Court of Appeals for the Third Circuit.

Respectfully Submitted

WILBUR GREENBERG
ALBERT J. OLIZI, JR.
Attorneys for Petitioner,
MORRIS I. KURTZ

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1982, three true and correct copies of the Petition for Writ of Certiorari were served by First Class Mail, Postage Prepaid, to the following:

JAMES G. SHEEHAN
Assistant United States Attorney
3310 United States Courthouse
601 Market Street
Independence Mall West
Philadelphia, Pennsylvania 19106

I further certify that all parties required to be served have been served.

ALBERT J. OLIZI, JR.
Attorney for Petitioner,
MORRIS I. KURTZ